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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

TEVAREZ RICHARD LOPEZ, Petitioner, v. THE SUPERIOR COURT OF EL DORADO COUNTY, Respondent; THE PEOPLE Real Party in Interest.	C089314 (Super. Ct. No. S16CRF0048)
HARVEST CYCLE DAVIDSON, Petitioner, v. THE SUPERIOR COURT OF EL DORADO COUNTY, Respondent; THE PEOPLE Real Party in Interest.	C089318 (Super. Ct. No. S16CRF0048)

In 2018, petitioners Tevarez Richard Lopez and Harvest Cycle Davidson, and three-codefendants, were charged by information in El Dorado County with the murder of Dennis and two counts of robbery. The information also alleged the special circumstance that the murder was committed while defendants were engaged in the commission of robbery. (Pen. Code, § 190.2, subd. (a)(17)(A).)[1] Later that year, the Legislature passed and the Governor signed into law Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which amended sections 188 and 189 to restrict the circumstances under which a person can be liable for murder under the felony-murder rule or the natural and probable consequences doctrine. (Stats. 2018, ch. 1015, §§ 2-3.) Petitioners filed motions to set aside the information pursuant to section 995. The respondent superior court denied their motions and concluded Senate Bill 1437 is an unconstitutional amendment of two prior initiative measures—Proposition 7 (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978)) and Proposition 115 (Prop. 115, as approved by voters, Primary Elec. (June 5, 1990)). Petitioners filed separate writ petitions in this court challenging the superior court's ruling and asking us to prohibit the District Attorney of El Dorado County from proceeding against them on the murder charge and special circumstance allegation. On this court's own motion, the two cases were consolidated for purposes of oral argument and disposition.

We conclude the Legislature's recent amendments to section 188 and 189 were not an invalid amendment of either Proposition 7 or 115 because they did not add to or take away from any provision in either initiative. Nonetheless, the evidence adduced at the preliminary hearing was sufficient to hold petitioners to answer for murder and the felony-murder special circumstance. Therefore, we deny the petitions.

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[1] Undesignated statutory references are to the Penal Code.

I. BACKGROUND

A. Factual Background

At the preliminary hearing that was conducted in June 2017, the prosecution presented the following evidence:

T.K. rented a house to petitioner Lopez, and they did marijuana deals together. In January 2016, Lucas asked T.K. if he could get 100 pounds of marijuana. Lucas had been asked by Neil to obtain this amount for a friend. Initially, T.K., Lopez, and Lucas were going to make $100 per pound each on the deal.

On January 29, 2016, T.K. met with Dennis, Dennis's girlfriend, and petitioners at his house in Shingle Springs. Dennis brought 100 pounds of marijuana. The group bagged the marijuana, put it into duffel bags, and headed to Neil's house in South Lake Tahoe in separate cars. T.K. rode in Lopez's truck with petitioners, and Dennis rode in his truck with his girlfriend. Halfway to Neil's house, they pulled over when Lopez, who was communicating with Dennis, said the deal was not going to work out for Dennis, and the price had changed. Lopez and Dennis were on the phone, and then texting back and forth. After five or 10 minutes on the side of the road, Lopez turned around because Dennis had. Later that evening, T.K. and Lopez talked about trying to get Dennis to lower the price.

The next morning, T.K. called Lopez and they decided they would make less on the deal in order to make it go forward. A few hours later, at around noon or 1 p.m., Lopez told T.K. that he would not be present for the deal. T.K. was surprised and expressed concern about doing the deal himself, but Lopez told him he had important family matters to take care of and it would be fine.

T.K. booked a hotel room in South Lake Tahoe for the sale to take place in. Lopez relayed information between T.K. and Dennis regarding what time to meet and where. T.K. drove to the hotel by himself at around 4:30 p.m. and checked in. Soon, Dennis and his girlfriend arrived. Lucas, Neil, and the man that was buying the marijuana arrived

next. After they were all inside the room, Dennis left and returned with three large duffel bags of marijuana from his truck. The buyer inspected the marijuana and decided not to purchase it because it had "no nose." After the marijuana was put back into Dennis's truck, Dennis returned to the room.

T.K. testified that he and Dennis later left the room at the same time. T.K. went to his car, and Dennis went to his truck. T.K. saw two men try to grab a bag from Dennis's hand. They said, "Give me that." Dennis refused and did not let go of the bag. T.K. said the men pushed Dennis, and Dennis's girlfriend appeared and pushed the men. The men pushed back. T.K. heard multiple gunshots. After the shots, he saw the two men start running to a car that was somewhere between the parking lot and the street.

Lucas testified that he was the last to leave the room. As he did so, he saw two men threatening Dennis and his girlfriend. One of the men had a gun that he was pointing at Dennis. The man said, " 'Give me the money, blood. Give me the money. Where's the money?' " Dennis had his hands up: " 'I don't want any problems.' " Lucas saw the man "open fire" on Dennis: "He shot him fast, choo, choo, choo. Choo, choo, choo." Meanwhile, the second person struggled with Dennis's girlfriend.

Dennis's girlfriend told law enforcement that the two men demanded money and one of them wrestled her purse away from her. Then, Dennis had his hands down and out, and told the men not to hurt her. She came around to the side of the truck and fell down after she was hit on the side of the head. After she fell down, she heard more than one shot and saw Dennis go to the ground. Dennis's girlfriend said that, at some point, she fired her .32 caliber gun more than once trying to cycle or manipulate it, but did not hit anything other than the ground. She said the gun was eventually placed in the back of the truck.

After the shooting, Lopez told law enforcement that he and Davidson were friends, and Davidson was aware of the new plan to sell the marijuana, but not the specifics of it. Lopez had known Dennis for a few months, having previously done smaller marijuana

deals involving him. Lopez claimed he had nothing to do with Dennis's death or any robbery.

T.B. testified that, on January 30, 2016, at around 3 p.m., co-defendant Dion Jermaine Vaccaro told him to go to South Lake Tahoe to "help him go pick up weed."[2] They met at a gas station in Fairfield. T.B. drove a gold car with co-defendant Domenic Seanlee Randolph as his passenger. From the gas station, T.B. followed Vaccaro, who drove his black car with Davidson and co-defendant Andrew Datre Adams inside to South Lake Tahoe. After a stop across the street from the hotel, Randolph and Adams switched cars. At the hotel, T.B. parked in the parking lot. He did not see Vaccaro's black car. He did see three men leave a truck parked next to him and go into a room. A man with a beard and a woman arrived in a different truck. The bearded man took bags into the room, and then he, another man, and the woman left the room separately about 25 minutes later. T.B. said a confrontation started after Vaccaro and Randolph "came around the corner" from another part of the hotel. It was the first time he had seen either of them or Davidson since the stop across the street. Vaccaro asked, " 'Where's it at?' " and someone replied, " 'It's in the purse. It's in that purse. Take the purse.' " The bearded man, Randolph, and Vaccaro struggled for the purse. Randolph got the purse and started to walk away. Vaccaro started to walk away as well. T.B. said when the man with the beard followed, Vaccaro turned around and shot him. Then the woman fired a shot. T.B. drove away. After Adams received a phone call, T.B. drove to a different hotel to meet Vaccaro.

T.B. testified there was no prior discussion of a gun that day, but he had seen Vaccaro with the same type of gun a couple of days earlier.

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[2] Similarly, co-defendant Adams told law enforcement the reason for going to South Lake Tahoe was to purchase marijuana. He said, "the situation went bad."

Adams told law enforcement that the gun Vaccaro used was his, and he knew Lopez through Vaccaro.

Law enforcement found three duffel bags of marijuana inside the cab of Dennis's truck. They also found a .22 caliber revolver inside the cab of the truck and a .32 caliber gun in the bed of the truck. Two 10 millimeter shell casings and three .32 caliber shell casings were recovered from the scene. Dennis died due to blood loss from gunshot wounds. During the autopsy, two bullets were removed from his body.

Lopez's phone records from the day of the shooting show there were three communications around noon between his phone and Davidson's phone. There were 12 communications between Lopez's phone and Vaccaro's phone. At 4:35 p.m., Lopez wrote to Vaccaro, "Fam it's locked in y'all gon see when you get there blood knows the wip n the cats in they[']ll be there so get that good issue."[3] After he was shown the text, Lopez asked law enforcement "what sort of charges he would be looking at" and "began to speak about how no matter what he said, he was still looking at the same charges as the individuals that actually pulled the trigger in this case, and that he would be looking at life no matter what he said."

There were also multiple communications between Lopez's phone and Dennis's phone on June 30. At 6:38 p.m., Dennis wrote Lopez, "I see [T.K.] Are you here?" Four minutes later, Lopez responded, "Not yet. I'm a ways away, but it's cool, brother. [T.K.]'s a good dude."

The owner of a different hotel in South Lake Tahoe testified that Davidson arrived just before 8:00 p.m. seeking a room. She showed the room to him and two other men. The owner heard one of the two other men throw up in the restroom. Davidson and the other man who had not thrown up told the owner, "He'll be fine." Shortly thereafter,

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[3] A "wip" refers to a vehicle and "cats" refers to people.

Davidson used a phone in the lobby to make a phone call. Law enforcement later determined the call was to Adams.

B. Procedural Background

After the preliminary hearing, as relevant to these proceedings, the magistrate found sufficient evidence to hold petitioners to answer for murder (count 1) and one count of robbery (count 2). It was alleged in connection with both counts that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The magistrate found probable cause to support the arming allegations as to Davidson but not Lopez. The court also explained its conclusion that petitioners were major participants who acted with reckless indifference to human life under *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*).

In May 2018, the District Attorney of El Dorado County filed a first amended information that added a second count of robbery (count 3) and the special circumstance that the murder was committed while defendants were engaged in the commission of robbery. (§ 190.2, subd. (a)(17)(A).)

After Senate Bill 1437 became effective, petitioners moved pursuant to section 995 to set aside the information for lack of reasonable or probable cause.[4] Their briefing relied in part on the bill's limitations on liability for felony murder as set forth in sections 188 and 189. The prosecution opposed the motions and argued Senate Bill 1437 is an invalid attempt to amend Propositions 7 and 115. The respondent court agreed with the prosecution and denied the motions. In applying *Banks* and *Clark*, the court stated, "it's clear from the evidence and inferences that this was a drug ripoff and arming was going to be needed and force was going to be needed."

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[4] Lopez was charged with and held to answer for one count of conspiracy to sell or transport marijuana that he did not move to set aside and that is not the subject of these proceedings.

Davidson filed a petition for writ of prohibition and a request for a stay of the superior court proceedings in this Court. He argues the Legislature's changes to the felony-murder rule did not amend Propositions 7 or 115, and there was insufficient evidence to allege he was liable for felony murder under an aider and abettor theory of liability or the special circumstances. Lopez filed a petition for a writ of mandate and/or prohibition and also requested a stay of the superior court proceedings. Lopez joined in Davidson's arguments regarding the constitutionality of Senate Bill 1437. Lopez also argues the murder count and special circumstance allegation should be dismissed as to him. Additionally, Lopez challenges the sufficiency of the evidence at the preliminary hearing to support the robbery counts as to him. We denied the requests for a stay absent a showing of an imminent trial date, and requested informal written responses to the petitions. The Attorney General's opposition briefs on behalf of the People of the State of California as real party in interest[5] agreed with petitioners that Senate Bill 1437 is constitutional, but argued that the petitions should nonetheless be denied because there was sufficient evidence to establish probable cause that Davidson committed special-circumstance felony murder and that Lopez committed special-circumstance felony murder and robbery even under the law as amended by Senate Bill 1437. Petitioners filed replies to the informal written response.

We summarily denied the petitions and indicated we were expressing no opinion as to the constitutionality of Senate Bill 1437.

Davidson and Lopez filed petitions for review in the California Supreme Court. The Supreme Court granted their petitions for review and transferred the matters to this court with directions to vacate our orders denying their petitions for writ of prohibition and to issue an order to show cause to the superior court why relief should not be granted

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[5] The District Attorney of El Dorado County has filed amicus briefs on behalf of the People of El Dorado County in these proceedings.

based on petitioners' claims that: (1) Senate Bill 1437 is not an unconstitutional amendment of Proposition 7 and/or Proposition 115; and (2) the evidence at the preliminary hearing was insufficient to hold them to answer for murder.

We vacated our denials of the petitions and issued orders to show cause. We also directed the real party in interest to file written returns. In its returns, the Attorney General's Office again argued Senate Bill 1437 is constitutional but the petitions should nonetheless be denied based on the showing of probable cause. Petitioners each filed a traverse to the return.

C. Legal Background Prior to 2019

We begin by reviewing the relevant law prior to the passage of Senate Bill 1437, with an emphasis on the contributions of Propositions 7 and 115.

Petitioners were charged with murder under section 187, subdivision (a), which defines murder as "the unlawful killing of a human being . . . with malice aforethought." Malice may be express or implied. (§ 188.) It is express "when there is manifested a deliberate intention" to unlawfully take "the life of a fellow creature." (Former § 188, now § 188, subd. (a)(1).) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Former § 188, now § 188, subd. (a)(2).)

Prior to 2019, section 189 provided, in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under [s]ection 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of

murders are of the second degree." (Stats 2010, ch. 178, § 51.) "[S]ection 189 serves both a degree-fixing function and the function of establishing the offense of first degree felony murder. [Citation.] It defines second degree murder as well as first degree murder." (*People v. Harris* (2008) 43 Cal.4th 1269, 1295, emphasis omitted.)

Under the felony-murder rule, "when the defendant or an accomplice kills someone during the commission, or attempted commission, of an inherently dangerous felony, the defendant is liable for either first or second degree murder, depending on the felony committed. If the felony is listed in section 189, the murder is of the first degree; if not, the murder is of the second degree. [Citations.] Felony-murder liability does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) Put differently, " '[t]he felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1184.)[6] "The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

Section 189 has been amended multiple times, including, as relevant to these proceedings, by Proposition 115 and Senate Bill 1437. Proposition 115, an initiative measure adopted in 1990, was "a comprehensive criminal justice reform package," (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 347) entitled the "Crime Victims Justice Reform Act" by its drafters, that adopted "a variety of changes and additions to our state Constitution and statutes" (*id.* at p. 347). One such change was amending section 189 to

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[6] The second degree felony-murder rule is based in statute as well—"specifically section 188's definition of implied malice." (*People v. Chun, supra,* 45 Cal.4th at p. 1178.)

add kidnapping, train wrecking, and certain sex offenses to the list of felonies that could support first degree felony-murder liability. (Prop. 115, § 9.) Robbery was already on this list. (*Ibid*.)

"An aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule." (*People v. Chiu* (2014) 59 Cal.4th 155, 166.) "The natural and probable consequences doctrine was recognized at common law and is firmly entrenched in California law as a theory of criminal liability." (*Id.* at p. 163.) Under that doctrine, " ' "[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' " (*Id.* at p. 161.) " 'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' " (*Id.* at p. 164.)

Section 190 designates the punishment for murder. (*People v. Cooper* (2002) 27 Cal.4th 38, 40 (*Cooper*).) It too has been amended multiple times, including by the passage of Proposition 7, otherwise known as the Briggs Initiative, in November 1978. (*Cooper, supra*, at pp. 41-42.) "The purpose of the Briggs Initiative was to substantially increase the punishment for persons convicted of first and second degree murder." (*Id.* at p. 42.) The measure increased the punishment for first degree murder without special circumstances from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1079, fn. 6; Prop. 7, §§ 1-2.) Proposition 7 also increased the punishment for second degree murder to a term of 15 years to life. (Prop. 7, §§ 1-2.) Additionally, the initiative expanded the special circumstances that would subject a defendant to a sentence of death or life

without the possibility of parole. (See *People v. Weidert* (1985) 39 Cal.3d 836, 844; see also Prop. 7, §§ 5-6.)[7]

In addition to amending section 189, Proposition 115 amended section 190.2 to add subdivisions (c) and (d). (Prop. 115, § 10.) These subdivisions require a sentence of death or life without the possibility of parole in two situations where the defendant is not the actual killer: (1) the defendant "with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree" (§ 190.2, subd. (c)), and (2) the defendant "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of" a specified felony (such as robbery) that results in death and the defendant is found guilty of first degree murder for that death (§ 190.2, subd. (d)). (See also Prop. 115, § 10.) Previously, "state law made only those felony-murder aiders and abettors who intended to kill eligible for a death sentence." (*Banks*, *supra*, 61 Cal.4th at p. 798.)

D. Senate Bill 1437

In enacting Senate Bill 1437, the Legislature declared "a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).) Further, "[r]eform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison

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[7] Proposition 7 amended section 190.2, subdivision (b) to state: "Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall" be punished by death or life in prison without parole when one or more specified special circumstances are found true, including the felony-murder special circumstance set forth in section 190.2, subdivision (a)(17). This provision would have applied to these proceedings were it not subsequently deleted and replaced by subdivisions (c) and (d) by Proposition 115, which we will discuss next.

overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (*Id.*, subd. (e).) Specifically, "[i]t is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (*Id.*, subd. (f).) To accomplish this, Senate Bill 1437 amended section 188 to provide: "Except as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)

Section 189, subdivision (e), as amended, provides that a participant in a felony specified in subdivision (a) is liable for murder for a death during the commission of the offense only if one of the following is proven: "(1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of [s]ection 190.2." Thus, "the standard under section 189, subdivision (e)(3) for holding a defendant liable for felony murder is [now] the same as the standard for finding a special circumstance under section 190.2[, subdivision](d), as the former provision expressly incorporates the latter." (*In re Taylor* (2019) 34 Cal.App.5th 543, 561.) Senate Bill 1437 also added section 1170.95, which allows those "convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" when certain conditions apply. (§ 1170.95, subd. (a).)

II. DISCUSSION

A. Amendments to Initiatives

Article II, section 10, subdivision (c) of the California Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval." Thus, "[t]he Legislature may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, 'and then only upon whatever conditions the voters attached to the Legislature's amendatory powers.' " (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 568 (*Pearson*).) "The evident purpose of limiting the Legislature's power to amend an initiative statute ' "is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " ' " (*County of San Diego v. Commission on State Mandates* (2018) 6 Cal.5th 196, 211 (*Commission on State Mandates*).)

Proposition 7 "did not authorize the Legislature to amend its provisions without voter approval." (*Cooper, supra,* 27 Cal.4th at p. 44.) "[T]he Legislature may amend Proposition 115's statutory provisions without voter approval, but only by a two-thirds vote of each house." (*Pearson, supra,* 48 Cal.4th at p. 569.) "The Legislature passed Senate Bill 1437 by a two-thirds vote in the Senate and a less-than-two-thirds majority in the Assembly." (*People v. Superior Court* (*Gooden*) (2019) 42 Cal.App.5th 270, 277 (*Gooden*).) Thus, Senate Bill 1437 may not amend Proposition 7 or 115 without violating article II, section 10, subdivision (c) of the California Constitution. The issue presented by the proceeding is therefore whether the portions of Senate Bill 1437

applicable to this proceeding constitute an amendment of Proposition 7 or 115 for purposes of this constitutional provision.[8]

Our Supreme Court has described such an amendment "as 'a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.' [Citation.] But this does not mean that any legislation that concerns the same subject matter as an initiative, or even augments an initiative's provisions, is necessarily an amendment for these purposes. 'The Legislature remains free to address a " 'related but distinct area' " [citations] or a matter that an initiative measure "does not specifically authorize *or* prohibit." ' " (*Pearson, supra,* 48 Cal.4th at p. 571.) In deciding whether a particular piece of legislation has amended an initiative, our Supreme Court has framed the question as simply whether the legislation "prohibits what the initiative authorizes, or authorizes what the initiative prohibits." (*Ibid*.; see also *Cooper, supra,* 27 Cal.4th at p. 47.)

In order to answer this question, we must first decide what the voters contemplated in enacting each initiative. (*Pearson, supra,* 48 Cal.4th at p. 571.) " 'The voters should get what they enacted, not more and not less.' [Citation.] [¶] This is a question of statutory interpretation. When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters

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[8] The Attorney General's briefing additionally argues the bill's addition of section 1170.95: (1) does not amend Proposition 7; (2) does not violate the separation of powers doctrine; and (3) does not violate the Victims' Bill of Rights Act of 2008, commonly known as Marsy's Law. These proceedings, however, do not involve a petition to vacate a murder conviction under section 1170.95. As such, we need not address these arguments. We do note that an appellate court in direct appeals from such petitions agreed with the Attorney General's arguments. (See *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 252-266; *Gooden, supra,* 42 Cal.App.5th at p. 286.)

intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*Ibid*.)

1. Proposition 7

As set forth above, Proposition 7 increased the punishment for murder. After passage of Proposition 7, section 190 provided: "Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in [s]ections 190.1, 190.2, 190.3, 190.4, and 190.5. [¶] Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life." (Prop. 7, § 2.) Additionally, the initiative expanded the special circumstances which can subject a person convicted of first degree murder to a punishment of death or life without the possibility of parole under section 190.2. (Prop. 7, §§ 5-6.) "From the language of Proposition 7, therefore, it is apparent voters approved the initiative to enhance punishments for persons who have been convicted of murder." (*Gooden*, *supra*, 42 Cal.App.5th at p. 281.) Senate Bill 1437 does not amend section 190 et seq. Nor do Senate Bill 1437's amendments to sections 188 and 189 prohibit any form of punishment for murder. Rather, they address who can be convicted of murder, something Proposition 7 does not specifically address.

This court has previously explained, in part, that "[a]n amendment is ' . . . any change of *the scope or effect* of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form. ' " (*Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 776 (*Cory*), italics added.) The respondent court utilized the italicized portion of this definition in concluding that Senate Bill 1437 "narrows the scope of Proposition 7 by limiting the

number of defendants who will be eligible for murder conviction." Proposition 7 applies to every person guilty of murder. Senate Bill 1437 did not narrow its scope in that sense. Rather, the court concluded Senate Bill 1437 narrowed the scope of Proposition 7 because it limits the number of people who can be guilty of murder and subsequently have Proposition 7 apply to them. This interprets *Cory* to invalidate any legislation that has any impact upstream of an initiative measure. The suggestion that any legislation that changes the scope or effect of legislation in this broad sense constitutes an amendment is incorrect.

California Redevelopment Assn. v. Matosantos (2011) 53 Cal.4th 231 is instructive. In *Matosantos*, the Legislature's dissolution of redevelopment agencies was challenged on the grounds the legislation was inconsistent with a 1952 initiative. (*Id*. at p. 256.) "In the aftermath of World War II, the Legislature authorized the formation of community redevelopment agencies in order to remediate urban decay." (*Id*. at p. 245.) Redevelopment agencies generally could not levy taxes and relied on tax increment financing for funding. (*Id*. at p. 246.) Through the 1952 initiative, the voters amended the Constitution to make "express the Legislature's authority to authorize property tax increment financing of redevelopment agencies and projects." (*Id.* at p. 256.) Our Supreme Court explained that nothing in the initiative's "text creates an absolute right to an allocation of property taxes." (*Id*. at p. 257.) "Nor does anything in the text . . . mandate that redevelopment agencies, once created, must exist in perpetuity." (*Ibid*.) We observe that the dissolution of redevelopment agencies inherently had an effect on initiative provisions authorizing their funding—it rendered them unnecessary and unutilized. But the funding of redevelopment agencies and the existence of redevelopment agencies are distinct—like an offense and its penalty—and thus the Legislature retains the power to alter one without it being an invalid amendment to the other.

Further, in *People v. Kelly* (2010) 47 Cal.4th 1008 (*Kelly*), our Supreme Court noted that *Cory*, and others citing it, "contain broad definitions of the amendment process in this context" and our Supreme Court has not "endorse[d] any such expansive definition" of an amendment for purposes of article II, section 10, subdivision (c), of the California Constitution. (*Kelly*, *supra*, at p. 1026.)[9] The court in *Kelly* further "question[ed] some of the broad language in prior decisions such as *Cory* . . ., which in some respects conflicts with" language the court *has* adopted. (*Id.* at p. 1026, fn. 19.) In particular, our Supreme Court has emphasized that "[t]he Legislature remains free to address a ' "related but distinct area" ' [citations] or a matter that an initiative measure 'does not specifically authorize *or* prohibit.' "[10] (*Id.* at pp. 1025-1026; accord *Pearson*, *supra*, 48 Cal.4th at p. 571.) This is the principle that guides the outcome in this proceeding. As another appellate court recently concluded, "Senate Bill 1437 presents a classic example of legislation that addresses a subject related to, but distinct from, an area

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[9] In *Kelly*, the court explained that in this context "[i]t is sufficient to observe that . . . an amendment includes a legislative act that changes an existing initiative statute by taking away from it." (*Kelly*, *supra*, 47 Cal.4th at pp. 1026-1027.) Subsequent opinions indicate there is no need to further debate the standard of review. (*See Pearson*, *supra*, 48 Cal.4th at p. 571 ["In deciding whether this particular provision amends Proposition 115, we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits"]; see also *Cooper*, *supra*, 27 Cal.4th at p. 44 ["An amendment is a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision"].)

[10] Likewise, the court in *Kelly* observed "decisions frequently have asserted that courts have a duty to ' " 'jealously guard' " ' the people's initiative power, and hence to ' " 'apply a liberal construction to this power wherever it is challenged in order that the right' " ' to resort to the initiative process ' " 'be not improperly annulled' " ' by a legislative body. [Citations.] [¶] At the same time, despite the strict bar on the Legislature's authority to amend initiative statutes, judicial decisions have observed that this body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The Legislature remains free to address a ' "related but distinct area" ' [citations] or a matter that an initiative measure 'does not specifically authorize *or* prohibit.' " (*Kelly*, *supra*, 47 Cal.4th at pp. 1025-1026.)

addressed by an initiative." (*Gooden, supra,* 42 Cal.App.5th at p. 282.) "A criminal offense is . . . a collection of specific factual elements that the Legislature has chosen to define as a crime." (*People v. Anderson* (2009) 47 Cal.4th 92, 101.) " ' "[P]unishment" has always meant a "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him." ' " (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1107.) While crimes and their punishment are invariably linked (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 478), " 'the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty' " (*Banks, supra,* 61 Cal.4th at p. 801). Senate Bill 1437's amendments to sections 188 and 189 do not amend the punishment for murder, but the offense. The legislation does limit the number of persons who can be convicted of murder, and thus to whom the sentencing provisions of Proposition 7 will ultimately apply. But Proposition 7 set the punishment for murder and did not speak to who or how many people should be convicted of murder. The question is whether the amendments to sections 188 and 189 "prohibit[] what the initiative authorizes, or authorize[] what the initiative prohibits." (*Pearson, supra,* 48 Cal.4th at p. 571.) They do not. The amendments do not proscribe or prohibit a punishment for either first degree or second degree murder. The punishment applicable to those convicted of first or second degree murder remains the same. The amendments are permissible because they are to a body of law that is related but distinct from the provisions of Proposition 7.

The relationship between the punishment for murder and the offense is reflected in the Legislature's purposes in enacting Senate Bill 1437. The Legislature declared "a need for statutory changes to more equitably *sentence* offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b), italics added.) The Legislature further stated, "Reform is needed in California to limit *convictions and subsequent sentencing* so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results

from lengthy sentences that are not commensurate with the culpability of the individual." (*Id*., subd. (e), italics added.) The Legislature understood that by changing who could be convicted of murder, it was altering those individual's sentences.[11] The respondent court concluded that by altering the definition of murder, Senate Bill 1437 circumvents the voter's determination of the appropriate punishment for murder and constitutes a de facto amendment of Proposition 7. The superior court stated, "the voters in enacting Proposition 7 necessarily embraced the statutory definitions and judicial interpretations of [murder]." We disagree with the court's assumption that by determining a particular punishment for murder was appropriate under the law regarding liability for murder as it then stood the voters were necessarily also preventing future changes to the law regarding liability for murder. We presume the electorate was aware of the existing law concerning the scope of the offense. (See *People v. Gonzales* (2017) 2 Cal.5th 858, 869 ["The electorate 'is presumed to be aware of existing laws and judicial construction thereof' "].) But a general reference to first or second degree murder in a statute is a general reference to the law and incorporates by reference any later changes to the law. (*People v. Hernandez* (2003) 30 Cal.4th 835, 864-865, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32 [concluding " 'the punishment shall be that prescribed for murder in the first degree' " is a general reference that "incorporates whatever punishment the law prescribed for first degree murder" when the crime was committed].) Thus, while we presume the voters were aware of the requirements for a murder conviction, nothing in the text of the statute indicates the voters intended to freeze those requirements in 1978.[12] (*Gooden, supra*, 42 Cal.App.5th at pp. 283-284.) "[A]nd

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[11] The Legislature also altered sentences through the petitioning procedures that are not at issue in these proceedings.

[12] Nor do the ballot materials contain any such indication. (See *Gooden, supra*, 42 Cal.App.5th at pp. 284-285.) The proponents described the measure as a "tough death

we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Pearson, supra,* 48 Cal.4th at p. 571.) " 'The voters should get what they enacted, not more and not less.' " (*Ibid.*)

Nor are we aware of any decision in the four decades since Proposition 7 passed that has treated the definition of murder as unalterable based on that initiative. For instance, in 2014, our Supreme Court held that a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine based on public policy: "[T]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated public policy concern of deterrence." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 166; see *id.* at pp. 158-159.) Our Supreme Court did not discuss the electorate's understanding of the scope of the doctrine

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penalty law" and "the strongest, most effective death penalty law in the nation." (Ballot Pamp., Gen. Elec. (Nov. 7, 1978), argument in favor of Prop. 7 and rebuttal to argument against Prop. 7, pp. 34, 35.) To that end, Senate Bill 1437 does not alter death penalty eligibility. The ballot materials regarding Proposition 7 contain no discussion of the parameters of liability for murder generally. Proponents argued the law would provide judges and law enforcement "a powerful weapon of deterrence in their war on violent crime." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 7, p. 34.) But "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." ' " (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 (*per curiam*); accord *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) This is true even where legislation calls for "liberal construction." (See, e.g., *Foster v. Workers' Comp. Appeals Bd*. (2008) 161 Cal.App.4th 1505, 1510 [workers' compensation law].)

in setting that penalty or suggest that this understanding was a consideration in the court's ability to set limits on the doctrine.

We do not suggest the Legislature's ability to alter liability for murder is limitless. (See *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 ["[T]he Legislature cannot indirectly accomplish, via the enactment of a statute which essentially amends any formula adopted to implement an initiative's purpose, what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions"].) But altering the parameters for vicarious liability for murder does not alter the sentence for murder and is not, as set forth in Senate Bill 1437, precluded by the terms of Proposition 7.

2. Proposition 115

As relevant to this proceeding, Proposition 115 amended section 189 to add kidnapping, train wrecking, and certain sex offenses to the list of predicate offenses giving rise to first degree felony-murder liability by adding the italicized language: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, *kidnapping*, *train wrecking*, or any act punishable under Section *286*, 288, *288a, or 289*, is murder of the first degree; and all other kinds of murders are of the second degree." (Prop. 115, § 9.) "When an existing statutory section is amended—even in the tiniest part—the state Constitution requires the entire section to be reenacted as amended." (*Commission on State Mandates*, *supra*, 6 Cal.5th at p. 208.) "The portions which are not altered are to be considered as having been the law from the time when they were enacted." (Govt. Code, § 9605, subd. (a); see also *Cooper*, *supra*, 27 Cal.4th at p. 43, fn. 4.) As we have explained, felony murder liability existed prior to the passage of Proposition 115. Proposition 115 elevated felony murder based on kidnapping, train

wrecking, and certain sex offenses to first degree murder. Felony murder based on robbery was already first degree murder and Proposition 115 made no change in that regard. Nor did it make any change to the natural and probable consequences doctrine.

The respondent court concluded Senate Bill 1437 impermissibly narrowed the definition of first degree murder that was in effect at the time of the passage of Proposition 115. We disagree.

As set forth above, "[t]he evident purpose of limiting the Legislature's power to amend an initiative statute ' "is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " ' " (*Commission on State Mandates, supra*, 6 Cal.5th at p. 211.) Proposition 115 poses a question that was addressed recently by our Supreme Court in *Commission on State Mandates*—what qualifies as undoing what the People have done in contravention of article II, section 10, subdivision (c) of the California Constitution "when the subject is a statutory provision whose reenactment was constitutionally compelled under article IV, section 9 of the Constitution." (*Commission on State Mandates, supra,* at p. 211.) Our Supreme Court held that "[w]hen technical reenactments are required under article IV, section 9 of the Constitution—yet involve no substantive change in a given statutory provision—the Legislature in most cases retains the power to amend the restated provision through the ordinary legislative process. This conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute." (*Id.* at p. 214.) Thus, a provision that was reenacted by the electorate and essential to accomplishing its goals is one that, despite its origins, is no longer capable of being undone by the Legislature without the consent of the people. (See *Hoechst Celanese Corp. v. Franchise Tax Bd*. (2001) 25 Cal.4th 508, 531 [" 'integral' means 'of, relating to, or serving to form a whole: essential to completeness: organically joined or linked:

Constituent, Inherent,' " emphasis omitted].) Again, the Legislature can address related but distinct areas from initiatives and matters that an initiative " ' "does not specifically authorize *or* prohibit." ' " (*Pearson, supra,* 48 Cal.4th at p. 571.) Taken together, these concepts mean that when a reenactment from the electorate is more than related but rather essential to the new provisions enacted by the electorate, the Legislature can no longer address what their combined, indistinct acts have specifically authorized or prohibited. This rule "comports with the Legislature's ability to change statutory provisions outside the scope of the existing provisions voters *plausibly had a purpose to supplant* through an initiative." (*Commission on State Mandates*, *supra*, at p. 214, italics added.) Restated provisions that are outside that scope remain capable of amendment by the Legislature as they were before. A broader construction of article II, section 10, of the California Constitution is unnecessary to safeguard the people's right of initiative. (*Commission on State Mandates*, *supra*, at p. 214.) "To the contrary: Imposing such a limitation as a matter of course on provisions that are merely technically restated would unduly burden the people's willingness to amend existing laws by initiative." (*Ibid*.)

We find no indicia in the ballot materials to support the conclusion that voters would have "reasonably understood" they were restricting the Legislature's ability to amend the felony-murder rule as it subsequently did through Senate Bill 1437. (See *Commission on State Mandates*, *supra*, 6 Cal.5th at pp. 213-214 ["no indication appears in the text of the initiative, nor in the ballot pamphlet, to suggest voters would have reasonably understood they were restricting the Legislature from amending or modifying any of the duties set forth in the test claim statutes"].)

The preamble to Proposition 115 states the electorate's goals in enacting the initiative broadly: "to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes,

neighborhoods, and schools." (Prop. 115, §1, subd. (c).) The Legislative Analyst set forth relevant background: "Under California law, the crime of first-degree murder is defined as one which is deliberate, or takes place during the commission of certain other crimes, or involves torture or the use of poison or certain destructive devices. In general, first-degree murder is punishable by 25 years to life imprisonment with the possibility of parole. If 'special circumstances' are found or the commission of a specific crime is involved, adults may be sentenced to life imprisonment without the possibility of parole, or to death." (Ballot Pamp., Prim. Elec. (June 5, 1990), analysis of Prop. 115 by Legis. Analyst, p. 32.) The voters were told that the measure: (1) "[e]xpands the definition of first-degree murder to include murder committed during the commission or attempted commission of additional serious crimes" and (2) "[e]xpands the list of 'special circumstances' to include a variety of serious crimes, such as the killing of a witness to prevent his or her testimony in certain juvenile proceedings." (*Ibid*.) Retaining the full scope of the felony-murder rule is not essential to expanding the definition of first degree murder to include murder during the commission or attempted commission of those offenses. The voters were not told that the initiative had any impact on the scope of that rule. Again, the Legislature has acted in an area related, but distinct from the one addressed in Proposition 115. Section 189 still provides that a participant in a felony specified in subdivision (a) is liable for murder for a death during the commission of the offense, but subdivision (e) adds the additional requirements that one of the following must also be true: "(1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of [s]ection 190.2." Nothing in Proposition 115 or its ballot materials indicate an intent to limit the ability of the Legislature to make these changes. Thus, the amendments to sections 188

and 189 cannot be understood as undoing what the people did in Proposition 115. "For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process; the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote." (*Ross v. RagingWire Telecommunications, Inc*. (2008) 42 Cal.4th 920, 930.)

In sum, setting the parameters of the felony-murder rule and the natural and probable consequence was never "done" by the electorate. (See *Commission on State Mandates*, *supra*, 6 Cal.5th at p. 211.) Rather, it was done by the Legislature and the courts. As such, it could be undone by the Legislature without violating article II, section 10, subdivision (c) of the California Constitution. Thus, the recent legislative changes to section 188 and 189 were not invalid attempts to amend Proposition 115 or Proposition 7.

We now turn to the question of whether petitioners' motions to set aside the information should have been granted under the applicable law including these changes.

B. Section 995 Motions

Section 995 provides that an "information shall be set aside" if "the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) "In reviewing the denial of a [] section 995 motion to set aside an information, we 'in effect disregard[] the ruling of the superior court and directly review[] the determination of the magistrate holding the defendant to answer.' [Citations.] Insofar as the [] section 995 motion rests on issues of statutory interpretation, our review is de novo. [Citation.] Insofar as it rests on consideration of the evidence adduced, we must draw all reasonable inferences in favor of the information [citations] and decide whether there is probable cause to hold the defendants to answer, i.e., whether the evidence is such that 'a reasonable person could harbor a strong suspicion of the defendant's guilt.' " (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) Thus, "although there must be *some*

showing as to the existence of each element of the charged crime [citation] such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate." (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.) "This is an 'exceedingly low' standard." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245.)

1. Robbery

Lopez argues there was insufficient evidence to hold him to answer for robbery because he did not aid and abet the robbery as alleged in counts 2 and 3. He does not dispute that a robbery occurred. Rather, he argues he planned a drug sale. We conclude there was probable cause to hold Lopez to answer for robbery.

" 'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' " (*People v. Delgado* (2013) 56 Cal.4th 480, 486.)

While it appears Lopez originally facilitated a marijuana sale, the evidence suggests that when that sale fell through, he planned and aided in the perpetration of a robbery instead. None of the defendants other than petitioners were involved in the original sale. The following day, five men took two cars to drive to the site of the sale, but not go into the hotel room. Though Adams and T.B. later claimed the purpose of the trip was to purchase marijuana, those statements are contradicted by the evidence regarding the group's interaction with the victims in the parking lot. Further, there is no evidence suggesting that once they arrived at the hotel, Vaccaro, T.B., Adams, Davidson, or Randolph ever attempted to purchase marijuana.

Lopez was aware of the time and location of the sale because he relayed that information between T.K. and Dennis. He also communicated with Vaccaro and Davidson multiple times on the day of the shooting. It is reasonable to assume Lopez

told one or both of them where and when the sale was taking place even though neither was a part of it. When Dennis texted Lopez to ask if he was at the hotel yet, Lopez pretended he was coming. Earlier in the day, Lopez similarly assuaged T.K.'s concerns about going to South Lake Tahoe without him. There was probable cause that Lopez was aware of his co-defendants plan to rob and aided their commission of this crime.

2. Felony Murder and Robbery-Murder Special Circumstance

Petitioners argue there was insufficient evidence to hold them to answer for murder after the enactment of Senate Bill 1437 or to support the special circumstance allegation.

In *Banks, supra,* 61 Cal.4th 788, our Supreme Court addressed "under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant." (*Id*. at p. 794.) The court explained that section 190.2, subdivision (d), which was added by Proposition 115, "was designed to codify the holding of *Tison v. Arizona* (1987) 481 U.S. 137, which articulates the constitutional limits on executing felony murderers who did not personally kill. *Tison* and a prior decision on which it is based, *Enmund v. Florida* (1982) 458 U.S. 782, collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions. Section 190.2[, subdivision](d) must be accorded the same meaning." (*Banks, supra,* at p. 794.) So too must section 189, subdivision (e)(3), which uses the same standard.

Among those factors that are relevant in determining whether a defendant is a major participant, our Supreme Court has set forth the following: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the

scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used? No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major.' " (*Banks*, *supra*, 61 Cal.4th at p. 803, fn. omitted.)

Reckless indifference "encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, *supra*, 63 Cal.4th at p. 617.) Acting recklessly "encompasses both subjective and objective elements. The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what 'a law-abiding person would observe in the actor's situation.' " (*Ibid*.)

In *Clark*, our Supreme Court identified the following factors to consider when determining whether a non-shooter aider and abettor acted with reckless indifference to human life in armed robbery felony murders: (1) knowledge of weapons, and use and number of weapons; (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) the defendant's knowledge of a cohort's likelihood of killing; and (5) the defendant's efforts to minimize the risks of the violence during the felony. (*Clark, supra*, 63 Cal.4th at pp. 618-621.) Again, our Supreme Court has cautioned that " '[n]o one of these considerations is necessary, nor is any one of them necessarily sufficient.' " (*Id*. at p. 618.) In other words, none of the factors pertaining to major participation or reckless indifference to human life is an element to which the prosecution needed to adduce evidence at the preliminary hearing.

Rather, there are two elements: (1) being a major participant and (2) having reckless indifference to human life. (*Id*. at pp. 614-615.) And the two elements are interrelated such that " 'the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.' " (*Id.* at p. 615.)

Petitioners cite no authorities, and we are not aware of any, applying the *Banks/Clarks* factors in the context of determining whether there was reasonable or probable cause, rather than substantial evidence. This is significant because "[e]vidence that will justify a prosecution need not be sufficient to support a conviction." (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.)

a. Lopez

Lopez argues that, applying the *Clark* factors, he was not a "major participant" and did not act with "reckless indifference to human life" because there was no evidence he knew of any weapons, he was not present at the crime, the duration of the crime was brief, and there is no evidence a killing was planned by anyone. Both petitioners note Vaccaro's weapon was supplied by Adams.

As we discussed in connection with the robbery counts, Lopez communicated with Vaccaro and Davidson multiple times on the day of the shooting. Lopez also facilitated the robbery by ensuring T.K. and Dennis arrived at the appointed time and place. Additionally, Lopez had done previous drug deals with Dennis. Lopez also met with both victims the previous day, helped pack the marijuana, and attempted to go to South Lake Tahoe with the victims to facilitate the sale. When the victims arrived to sell the same quantity of marijuana the next day, they came with two guns. It is reasonable under the circumstances to infer Lopez helped plan the robbery and was aware the victims would likely be armed. "[P]hysical presence is not invariably a prerequisite to demonstrating reckless indifference to human life. Where, for example, a defendant instructs other members of a criminal gang carrying out carjackings at his behest to shoot any resisting victims, he need not be present when his subordinates carry out the

instruction in order to be found to be recklessly indifferent to the lives of the victims." (*Clark, supra*, 63 Cal.4th at p. 619.) Here, the plan apparently required five men and two separate cars to execute, though the exact role of some of the defendants is unclear. Lucas's testimony indicates Vaccaro fired multiple bullets at Dennis relatively quickly and without provocation. There was evidence Dennis had his hands up and was not resisting when he was shot. Based on this evidence, it is reasonable to infer the plan called for violence, as the superior court indicated. Thus, the plan was one "that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Id.* at p. 623.) There was probable cause to hold Lopez for murder and the felony-murder special circumstance.

b. Davidson

Davidson's petition assumes he knew of the plan to rob Dennis and his girlfriend, knew Vaccaro was armed, identified Dennis to Vaccaro, and drove Randolph and Vaccaro from the scene,[13] but he argues he could not have acted with reckless indifference to human life because he was parked around the corner and could not have seen the shooting, done anything to stop it, or rendered aid. To support this latter point, he contends that if he did have a clear line of sight of the shooting, he would have seen the bags returned to the car, and he would have known that the sale had not occurred. The fact Davidson apparently did not tell Vaccaro and Randolph that the bags had been returned to the car does not preclude him from having a clear view of events. Indeed, T.B. had a clear view of the shooting and apparently did not see this either. Further, we disagree that the record is clear about the location of Davidson during the shooting. The

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[13] In his traverse to the return, Davidson suggests his identification of Dennis was unnecessary because Lopez could have provided sufficient information to identity Dennis. Lopez's message to Vaccaro is sufficient to support the inference that Davidson's role nonetheless included identifying the victims.

magistrate stated that it inferred but could not "conclude based on the evidence, that probably Mr. Davidson was left behind in the [black car] . . . as the wheelman after the shooting took place." Regardless, again, even where substantial evidence is required, "physical presence is not invariably a prerequisite to demonstrating reckless indifference to human life." (*Clark, supra*, 63 Cal.4th at p. 619.) While a defendant who fails to act as a restraining influence or render aid is arguably more at fault, a defendant who is apparently not close enough to do either is not automatically absolved of guilt. (*See id.* at p. 620 ["Defendant's absence from the scene of the killing and the ambiguous circumstances surrounding his hasty departure make it difficult to infer his frame of mind concerning [the victim]'s death"].) The People argue the testimony presented at the preliminary hearing would lead a person of ordinary prudence to conscientiously entertain a strong suspicion that Davidson was a major participant in the robbery and acted with reckless indifference to human life. They argue the defendants intended to rob Dennis of the proceeds of the sale and were willing to use deadly force if things did not go according to plan. As set forth above, we agree the record supports this characterization of the defendants' plan. Further, it was reasonable to entertain a suspicion that Davidson was "more than a mere getaway driver" in "a garden-variety armed robbery." (See *Banks, supra*, 61 Cal.4th at pp. 802, 805, 807 [defendant who was "no more than a getaway driver" could not qualify as a major participant].) Davidson met with the victim the previous day in preparing for the original sale of three duffel bags of marijuana, and he was with Lopez when this sale fell through. A robbery was apparently planned instead. At around the same time Lopez told T.K. that he would not be going to South Lake Tahoe, he was communicating with Davidson. Whatever value one ascribes to T.B.'s testimony, he rode to South Lake Tahoe in a separate car. Davidson rode with Vaccaro and Adams at least from Fairfield to South Lake Tahoe. Adams told law enforcement that the gun Vaccaro used was his. Under these circumstances, it is reasonable to entertain a suspicion that Davidson had some role in

planning the robbery. Moreover, unlike in *Banks*, where nothing in the record reflected that the getaway driver "knew there would be a likelihood of resistance and the need to meet that resistance with lethal force" (*id.* at p. 811), here it was reasonable to infer Davidson was fully aware of the plan and the dangers posed thereby. There was probable cause to hold Davidson for murder and the felony-murder special circumstance.

III. DISPOSITION

The petition for writ of prohibition and/or mandate filed by Lopez and the petition for writ of prohibition filed by Davidson are denied.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

MURRAY, J.